No. 13555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE JAMES ALGER FEE, *Judge*

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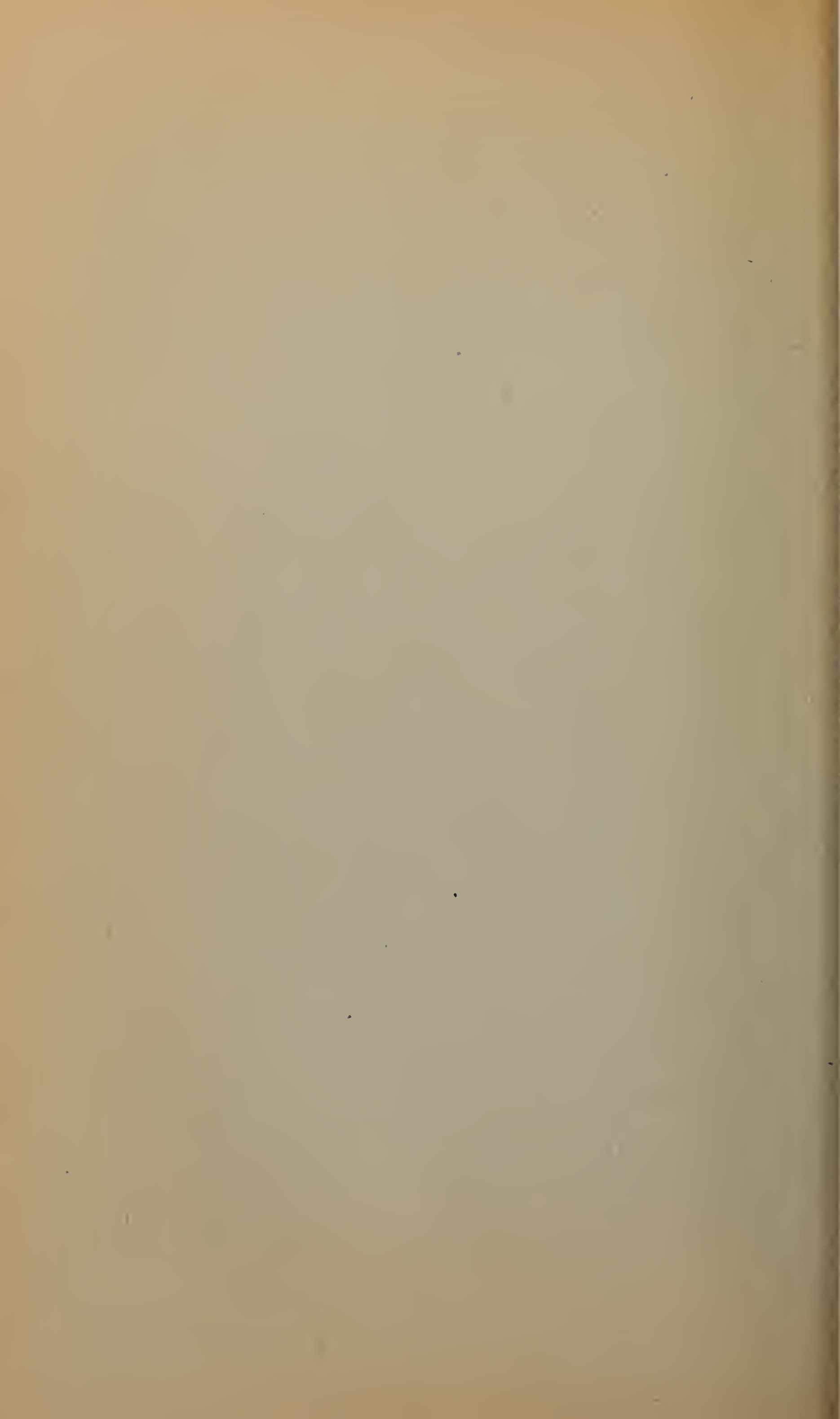

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SUBJECT INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE	3
POINTS OF APPEAL	7
SPECIFICATION OF ERRORS	7
ARGUMENT	10
THE QUESTION OF INVOLUNTARY VOTING	10
THE QUESTION OF ELECTION OF CITIZENSHIP	17
CONCLUSION	23

TABLE OF CASES

Acheson v. Kuniyuki, 189 F. (2d) 741.... 10, 13, 19

Furuno v. Acheson, 94 F. Supp. 381............ 11

Furuno v. Acheson, 106 F. Supp. 775.......... 14

Kawakita v. United States, 343 U.S. 717, 96 L. Ed. 799, 72 S. Ct. 950.................. 19, 20

Kuwahara v. Acheson, 96 F. Supp. 38........ 10, 14

Mandoli v. Acheson, Supreme Court of the United States, Decided November 24, 1952.... 20, 21

Naito v. Acheson, 106 F. Supp. 770............ 14

Ouye v. Acheson, 91 F. Supp. 129............ 10, 14

Rokui v. Acheson, 94 F. Supp. 439.......... 10, 14

Seki v. Acheson, 94 F. Supp. 438............. 10, 14

Page

Tsunashima v. Acheson, 83 F. Supp. 473 ...... 10, 14

Uyeno v. Acheson, 96 F. Supp. 510 .... 10, 11

Yada v. Acheson, 94 F. Supp. 438 .... 10, 14

Yamamoto v. Acheson, 93 F. Supp. 346 .... 10, 14

TEXTBOOKS

17 Am. Jur. Duress and Undue Influence, Sec. 11 . 14

STATUTES

Sections 401, 402 of the Nationality Act of 1940 . . 22

Section 503 of the Nationality Act of 1940 1

CONSTITUTION

Fourteenth Amendment to United States Constitution 2

CODES

8 U. S. C. 801 10

8 U. S. C. 903 .... 1, 2, 3

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BRIEF OF APPELLANT

JURISDICTION

This action was brought in the United States District Court for the Western District of Washington, Southern Division, under authority ot Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, on the ground the Appellant is a national and a citizen of the United States since birth by virtue of

the Fourteenth Amendment to the United States Constitution having been born in Firwood, Pierce County, Washington, United States of America and claims his permanent residence as Fife, Pierce County, Washington, in the Southern Division of the Western District of Washington and that said 8 U.S.C.A. 903, conferring jurisdiction on United States District Courts reads in part as follows:

> "If any person who claims a right or privilege as a National of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a National of the United States, such persons, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court for the District of Columbia or in the District in which such person claims a permanent residence for a judgment declaring him to be a National of the United States."

The section further provides that if such person is outside the United States when he institutes his suit he may obtain from the diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be deported in case it shall be decided that he is not a

National of the United States. This is set forth in the Amended Complaint (R. 3).

STATEMENT OF THE CASE

This is an action under the Nationality Act of 1940 (Title 8 U.S.C. Sec. 903) against the Secretary of State of the United States of America for a decree adjudging plaintiff to be a citizen of the United States of America.

The appellant was born in Firwood, Pierce County, Washington on March 13, 1926 (R. 47). His father had come to the United States in 1908 (R. 44) and lived in Fife, Pierce County, Washington since 1920 (R. 39). His father and mother had five children, including himself, all born in the United States. One son, Shoichi, died in action in Europe in 1945 while a member of the United States Army. Appellant resides with his father, mother, sister and brothers at Fife, Pierce County, Washington.

When appellant was nine years of age and after having had three years schooling here, his father took him and his brother, Shoichi, to Japan to be with their grandparents. Shoichi was brought back to the United States in 1939 and appellant was to come back in a few years but the war intervened so that this could not be accomplished. Appellant was

only in Japan temporarily and was to come back home to live with his father (R. 42).

Appellant was given the American first name of George and was never given a Japanese first name (R. 43).

Appellant attended school in Japan for nine years (R. 48). He was taught implicit obedience to his parents, grandparents and governmental authorities. He believed that if he were not obedient he would be disciplined (R. 48).

The appellant never served in the Japanese Army but was called up for physical examination (R. 48). When he went to be examined he noticed that the strict obedience to orders was required. He was kicked and was struck four times for trivial reasons. When answering questions his voice was too low so he was struck. He made a mistake as to his height and he was struck and reprimanded (R. 49). Also, during an air raid he was disciplined for wearing white clothing by the Japanese Military Police and regular city police.

Appellant was registered with the Japanese authorities by his cousin at the request of his grandmother. This was done because he was treated as a foreigner and was required to report to the police station and forbidden to carry a camera and could not

travel without permission. In addition to urging by his relatives the village officer asked him to register. His relatives felt that he was a disgrace on the family because he was an alien. (American), (R. 51 and 52).

Appellant testified that he never intended to lose his American citizenship and was thinking all the time about coming back to the United States to be with his family (R. 52).

After the war he made efforts to get in touch with the family about coming back to the United States. He received a letter from his parents telling him that he should come back to the United States immediately. He went to the foreign department in the Governor's office and asked them what to do. (R. 52). He was 21 at the time. He was told that there was an American Consulate's office in Yokohama but that in the near future there would be an American Consulate established in Kobe and that he had better wait until then.

He wanted to go to Yokohama but couldn't make it so he waited until the American Consulate in Kobe was established. About six months after the election of April 5, 1947, appellant went to the American consulate about returning to the United States. They would not give him any application forms because he

told them he had voted. (R. 57). This was the first time he heard that voting jeopardized his American citizenship (R. 58).

Appellant heard about the Japanese elections of April, 1947 through newspapers, radios and political speeches. "We were told that we should cooperate with the Japanese government and everybody should go for the election." He thought that he was personally requested to vote. (R. 53).

Appellant testified that the block leader or head of the block is elected by the head of the household of each family. He was a liaison person and his duties and authority were to receive any orders from the village officer and transmit them to the individuals in his particular block or neighborhood. (R. 54).

At the time of the April, 1947 elections, the block leader visited every family and asked them to go to the polls. The block leader asked his grandfather, in appellant's presence, to go to vote and to get the rest of the family to go to the polls. Appellant's grandfather went to vote and when he returned he told appellant that there were Japanese police and American military police at the polls. He also told appellant that if he didn't go to the polls he might get into trouble such as cancellation of his food ration card or be involved in some other trouble. He said

that all the neighbors were talking about it and told him that he had better hurry up and go (R. 55). On election day appellant also had a conversation with his uncle. His uncle requested him to go to the polls and told him "If you don't go to the election at this time you might get involved in a very deep trouble. I am going now so you might as well come along with me." His uncle conveyed the same message to him as his grandfather, so then appellant went to the polls with his uncle. There he saw the American military police as well as the Japanese police (R. 56).

In his questionnaire for the American Consul at Kobe, Japan (Defendant's Exhibit A-2, R. 88), appellant stated his reason for voting as follows:

"Overhearing rumors that non-participants were to be punished caused me to vote and I did not know that one loses his American citizenship by voting."

POINTS ON APPEAL

Appellant's Statement of Points on Appeal is set forth on pages 30 and 31 of the Transcript of the Record and are adopted as a part of this brief.

SPECIFICATION OF ERRORS

1. That the Court erred in not adjudging and not finding that George Takehara is a citizen of the

United States of America inasmuch as he was born in the United States and committed no act that would deprive him of his birthright as an American citizen.

2. That the Court erred in not finding and not adjudging that the voting of George Takehara in the April, 1947 election in Japan was done because of fear of punishment, duress or coercion and that the Court erred in not adjudging and not finding that such voting was not the free, voluntary and intelligent choice of George Takehara.

3. That the Court erred in rejecting the doctrine of duress as applied to voting in foreign elections.

4. That the opinion, findings of fact, conclusions of law and judgment of dismissal entered by the Court are contrary to the evidence and contrary to the law governing the case for the following reasons:

(a) The uncontradicted evidence shows that appellant voted because of fear of punishment, duress or coercion and said voting was not the free, voluntary and intelligent choice of the appellant.

(b) That appellant within six months after attaining majority went to the American Consulate at

Kobe, Japan to apply for permission to return to the United States and was not permitted to do so.

(c) In declaring that the appellant was a Japanese national during his minority and thereafter, and in declaring he was forgetful of the ways of the land of his birth, and in denying him consideration as an American citizen because he was brought up during the part of his minority in the language and customs of Japan.

(d) In finding that appellant voted only because he obeyed a direction of his grandfather and uncle (Opinion R. 25) to vote at the election without finding duress and without considering appellant's immaturity and the implied as well as expressed fear of punishment by way of loss of ration card or other "trouble".

5. That the Court erred in refusing to make and enter plaintiff's proposed findings of fact, conclusions of law and erred in refusing to make and enter plaintiff's proposed declaratory Judgment of Citizenship for the following reasons:

(a) That the evidence showed that the appellant voted because of fear of punishment, duress or coercion and said voting was not the free, voluntary and intelligent choice of appellant,

(b) That there was no evidence whatsoever upon which to base a deprivation of the appellant's birthright as an American citizen.

ARGUMENT
THE QUESTION OF INVOLUNTARY VOTING

As the Specification of Errors and Points on Appeal concern matters which are interrelated they will be considered together.

The statute involved is Title 8 U.S.C.A. Sec, 801 provides as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

In *Acheson vs. Kuniyuki*, 189 F. (2d) 741, the Court of Appeals for the Ninth Circuit declared Japan to be a foreign state within the meaning of Title 8, U.S.C.A. Sect. 801, but it also recognized the principle of involuntary voting as having no effect on United States citizenship.

In analyzing the *Uyeno*, *Tsunashima*, *Yamamoto*, *Seki*, *Yada*, *Rokui*, *Kuwahara* and *Ouye* cases infra cited with approval in the *Kuniyuki* case, supra,

in which these American citizens were coerced into voting by being told or made to fear that, unless they voted their food rations would be discontinued, we find that the case at bar comes well within this rule. The case of *Furuno vs. Acheson*, 94 F. Supp. 381 was also approved in that decision; the Furuno case held that the facts established that when the plaintiff voted she did so as a result of mistake, misunderstanding, undue influence and coercion which dominated her mind.

Uyeno vs. Acheson, 96 F. Supp. 510 cited by the Court of Appeals for the Ninth Circuit in the Kuniyuki case is a decision by District Judge Yankwich which is in agreement with the holding the Appellate Court. Judge Yankwich held that the act of an American-born Japanese minor in participating in the 1947 general election could not be held to have been such a deliberate choice of allegiance to another country as to have resulted in expatriation, where the constant reiteration of the importance of voting in such an election had been taken by the minor as a command on part of General MacArthur and occupation forces which he could not, with impunity, disobey and where he had been led to believe that if he did not vote he would lose his food ration. Quoting from that case:

"In the present case, the testimony of the plaintiff is that the constant reiteration through newspapers and over the radio, and by friends and advisers of the importance of voting and the need for voting was taken by him as "a command" on the part of General MacArthur and the Occupation Forces to vote, which he could not, with impunity, disobey. Indeed, he testified that, in addition to this, he was led to believe that if he did not vote, he would lose his food ration card. The essential foods on which the Japanese diet is based,—rice, soy, sugar, and the like,—were on the ration list. It is inconceivable that anyone could have remained alive in occupied Japan if he had been deprived of the means of lawful access to these staples. Singly, and together, these pressures, as envisioned by the plaintiff, are the real sources of his action. Motive does not, necessarily, detract from the nature of a voluntary act. But the facts we are considering go beyond mere motives. They are of a character which shows that the pressures exercised upon the plaintiff were so great that his participation in the election was not his voluntary act. I feel that the Consul, in his finding, and the Department, in endeavoring to sustain it, have, unconsciously perhaps, stressed too much the absence of an act of physical coercion. But in the realm of human action, modern psychology teaches us that group and individual pressures acting upon the needs of a person may be so overpowering in their nature as to overcome individual will and accomplish what physical violence could not."

"This is especially true in the case before us. We are not confronted with an adult who, given a deliberate choice between acts which express allegiance to the United States or allegiance to a foreign country, makes

a free choice, with full knowledge, and who, under the circumstances, should be held to its consequences. On the contrary, we are dealing with an immature young man,—an American-born Japanese,—whose citizenship was conferred on him by the 14th Amendment to the United States Constitution. See, *United States vs. Wong Kim Ark*, 1898, 169 U. S. 649; 18 S. Ct. 456, 42 L.Ed. 890; *Morrison vs. People of State of California*, 1934, 291 U. S. 82, 85, 54 S.Ct. 281, 78 L.Ed. 664. Taken to Japan at the age of four and one-half years, he was, without consultation, educated like a Japanese child. At no time after reaching maturity was he requested to make a choice indicating his allegiance to the United States. As a student in the technical school, he worked part-time in a factory which manufactured products which were probably used in the war effort. He learned as much English as he was taught in school, having forgotten whatever English he may have picked up in his childhood before leaving for Japan. In 1941, he expressed a desire to go to the United States. Although his parents did not object, he could not obtain passage. It is also significant that a brother and sister, evidently older, made their way to the United States before the beginning of the war, and their right to claim American citizenship was not challenged. Indeed, as stated before, the brother returned to the State of Washington and registered for the draft under the Selective Act of 1940. There is nothing in the action of the plaintiff from which any inference of deliberate choice of allegiance to another country could be inferred. See, *Podea vs. Acheson*, 2 Cir., 1950, 179 F. (2d) 306."

To the same effect are the following citations mentioned with approval in *Acheson v. Kuniyuki*,

supra: *Tsunashima v. Acheson*, 83 F. Supp. 473; *Kuwahara v. Acheson*, 96 F. Supp. 38; *Seki v. Acheson* and *Yada v. Acheson*, 94 F. Supp. 438; *Rokui v. Acheson*, 94 F. Supp. 439; *Yamamoto v. Acheson*, 93 F. Supp. 346; *Ouye v. Acheson*, 91 F. supp. 129, and the recently decided cases, *Naito v. Acheson*, 106 F. Supp. 770 and *Furuno v. Acheson*, 106 F. Supp. 775.

The lower Court did not agree with the above cited decisions (R. 25) and thought that courts were carried away emotionally (R. 114) and saw no justification for the theory of duress in the decisions cited by appellant (R. 102, 103). The Court said: "In any event, the fear of loss of food rationing card is not sufficient to raise the doctrine of duress in commercial transactions, and no good reason is seen why it is acceptable in an important transaction of this type." (R. 26)

The appellant submits that the lower Court was correct in stating that any matter affecting the birthright of American citizenship is an "important transaction" but that is was not correct on the subject of duress on which the general law is stated in 17 Am. Jur. Duress and Undue Influence, Section 11 from which we quote at pages 884 and 885:

> "There is no legal standard of resistance with which the person acted upon must comply

at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case, is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? *Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon.* His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress. Any threats of personal violence may constitute duress, whether of a nature such as would do so under the common-law rule, as, for instance, a threat to kill the person coerced, or merely of battery to his person, provided the threats in fact compel him to do an act which otherwise he would not have done. It is generally held, however, that the threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in that condition; and that an act subsequent to the time when the threats were employed will not be considered as having been

done under duress. If, however, the threats were long continued, and the act which it is sought to avoid was done such a short time thereafter as to indicate that the mind of the person was still under the influence of the threats, it has been held that this will constitute an act done under duress. The mere fact that a person is in fear of some impending peril or injury, or in a state of mental perturbation at the time of doing any act, is not sufficient ground for holding that the act was done under duress; nor can there be duress per minas from mere advice, direction, influence, or persuasion." (Italics ours)

From the above quotation, it is clear that "all of the circumstances" must be considered in determining whether the act was or was not under legal duress.

The Lower Court in its opinion (R. 25) says:

"The Court does not accept the story that he voted because he feared the loss of his ration card, *but does believe that plaintiff obeyed a direction of his grandfather and uncle, both citizens of Japan to vote at the election* and that he did not know that the act would cause his expatriation." (Italics ours)

The Lower Court said further (R. 26):

"He was brought up with the native Japanese tradition and educated in a family background requiring implicit obedience to his elders and the Imperial Government of the Emperor."

In other words the Court found that appellant voted because of the direction of his grandfather and uncle, having been brought up to implicitly obey his elders.

Without anything more, the Court actually decided appellant voted under coercion sufficient to render his act involuntary.

In addition to the appellant's family directing him to vote the lower court ignored the facts that the block leader was also after his family, including the appellant, to vote; that the radio, press and political speeches were out to get everybody to vote; and that ration cards, if cancelled, would imperil the appellant's survival.

Appellant was trained in implicit obedience. He had experienced brutal treatment for failure to comply. He could not with impunity disregard this pressure to vote if his survival depended on it. Under such circumstances his voting is not, and could not be, voluntary so as to cause loss of his American citizenship.

THE QUESTION OF ELECTION OF CITIZENSHIP

The appellant submits that:

1. The question of election of citizenship was not an issue in this case.

Even if it was, there is no evidence in the record to sustain the following statement in the lower Court's opinion (R. 26):

"He was educated exclusively in Japanese schools and, upon failure to obtain a sufficient mark to become an officer in the Japanese Army, served as a teacher in the official schools".

The record shows:

a. Appellant had three years of schooling in the United States.

b. Appellant did not serve in the Japanese Army nor did he apply or take examination as officer candidate for the Japanese Army. He merely took an Army physical examination (R. 49).

c. Appellant did not teach in official schools in Japan. He was a farm laborer (R. 69).

In the entered findings (R. 13) it is stated that the appellant had grown up from early childhood as a Japanese National, completely forgetful of the language, customs and ways of the land of his birth. The Court (R. 108, 109) blamed the appellant (as a minor) for getting himself educated in that situation, disregarding the fact that he had been corresponding with his immediate family, except during period of hostilities, all of whom were in the United States.

Furthermore, while the lower Court states:

"Against this background, his actions indicate a definite choice of Japanese citizenship exercised *after he had attained his majority.* American citizenship by birth cannot be lost involuntarily but it can be lost by voluntary conduct *after majority* by one who, by virtue of his residence, his

> official registration, his ancestry and members of his family, is entitled to Japanese citizenship. (R. 26, 27). (Italics ours)

The Court does not cite any act, aside from the appellant's voting which it calls a "minor factor", done by the appellant which would indicate an election by the appellant of Japanese citizenship as against American citizenship.

As against the facts of this case, our Supreme Court upheld American citizenship under facts far stronger indicating election of Japanese citizenship in *Kawakita v. United States*, 343 U. S. 717, 96. L.Ed. 799, 72 S.Ct. 950 where Kawakita was held to be an American citizen and therefore chargeable with the crime of treason in spite of the uncontradicted facts that after Kawakita was over the age of twenty one, he (1) registered as a Japanese national, (2) had his name removed as an American Alien at the Japanese Police Station, (3) changed his place of residence from California to Japan, (4) went to China on a Japanese passport, (5) accepted labor draft papers from the Japanese government, (6) faced the east each morning to pay his respects to the Emperor of Japan and (7) besides mistreating American prisoners of war.

If appellant is denied his American citizenship under the theory of election, or any theory, it will re-

sult in the application of the laws of the United States in one way where it is desired to prosecute a person born in this country for treason and in another way to deny one who is accused of no wrongdoing from exercising his birthright as an American citizen. Obviously, our laws and sense of justice requires its application in the same, way, namely, to require that the election be beyond reasonable doubt *Kawakita v. United States*, supra, or that the act expatriating an American citizen be done with absolute freedom, *Mandoli v. Acheson*, Supreme Court of the United States, decided November 24, 1952, *Acheson v. Kuniyuki*, supra, and cases approved therein.

2. A natural born citizen of the United States is not required to elect between dual citizenships upon reaching majority.

Such a citizen may accept some of the incidents of derivative dual citizenship without prejudice to his American citizenship. *Kawakita v. United States*, supra *Mandoli v. Acheson*, supra, holds in part as follows:

> "If petitioner, when he became of full age in 1928, were under a statutory duty to make an election and to return to this country for permanent residence if he elected United States citizenship, that duty must result from the 1907 Act then applicable. In the light of the foregoing history, we can find no such obligation imposed

by that Act; indeed it would appear that the proposal to impose that duty was deliberately rejected."

The Nationality Act of 1940, though not controlling here, shows the consistency of congressional policy not to subject a citizen by birth to the burden and hazard of election at majority. This comprehensive revision and codification of the laws relating to citizenship and nationality was prepared at the request of Congress by the Departments of State, Justice and Labor. The State Department proposed a new provision requiring an American-born national taken during minority to the country of his other nationality to make an election and to return to the United States, if he elected American nationality, on reaching majority. The Departments of Justice and Labor were opposed and, as a consequence, it was omitted from the proposed bill. This disagreement between the Departments was called to the attention of the Congress. While in some other respects Congress enlarged the grounds for loss of nationality, it refused to require a citzen by nativity to elect between dual citizenships upon reaching a majority."

3. A native born citizen of the United States does not lose his United States citizenship by foreign residence long continued after attaining his majority.

It was so held in *Mandoli v. Acheson*, supra, involving a person born of Italian parents brought to Italy as a "suckling" who, being denied entry into the United States as an American citizen, entered this country for the first time in 1948 under a certificate

of identity for the purpose of prosecuting an action to establish his citizenship when he was about forty years of age.

Kawakita made application for registration as an American citizen with the American Consulate in Japan three years after he attained his majority and while still in Japan during said period. In his case, it was held that the presumption of expatriation in Section 402 under Sections 401(c) or (d) of the Nationality Act of 1940 was a rebuttable presumption which was overcome upon a showing that he was not expatriated under Sections 401(c) or (d) of the said Act.

CONCLUSION

The facts and circumstances of this case show that the appellant, George Takehara, is a native born citizen of the United States and did not expatriate himself by his voting in the Japanese elections of April, 1947 because his act of so voting was not his free and voluntary act.

The judgment of the District Court should be reversed, with directions for the entry of an order declaring that petitioner is a citizen of the United States.

Respectfully submitted,

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